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In The

Supreme Court of the United States

October Term, 1966

No. 204

RICHARD ALLEN DOWDLE,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

In the Matter of the Application of

MATTHEW T. HOGAN, ESQ.,

Petitioner-Appellant,

v.

GORDON HOWE, Director of Finance of the County of Monroe, New York, THE HONORABLE ARTHUR LEVITT, Comptroller of the State of New York, and JOHN C. LITTLE, District Attorney of Monroe County, New York,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

The Appellants, pursuant to the United States Supreme Court Rules 13(2) and 15 file this their statement of the basis upon which they contend that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment of conviction of appellant, RICHARD ALLEN DOWDLE, and should exercise such jurisdiction in this case.

Opinion Below

The only opinion which the Courts below gave in this proceeding came from the Court of Appeals in the form of a memorandum by that Court. That memorandum is annexed to this Jurisdictional Statement at the end.

Jurisdiction

This appeal is from a final judgment of conviction of Appellant, RICHARD ALLEN DOWDLE, for the misdemeanor crime of third degree assault, reduced from the indictment charge of the felony of first degree rape.

The final judgment appealed from was entered in the office of the Clerk of Monroe County, Rochester, New York, on January 21st, 1966. Notice of Appeal to the Supreme Court of the United States was filed that same day, January 21st, 1966. The Clerk of Monroe County, New York, is also the Clerk of the Supreme Court of Monroe County, New York, and is the person in whose custody the original records in this prosecution remain under State Law. The Notice of Appeal was filed with him and with the clerk of the Court of Appeals of the State of New York; and copies were sent to all parties by mail on January 22nd, 1966.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment of conviction under the provisions of Title 28, U.S.C. Section 1257 (2).

The State statutes, whose validity under the 14th Amendment to the Constitution of the United States the appellant DOWDLE has attacked, are as follows:

N. Y. Code of Criminal Procedure — Section 308

". . . in a case where the offense charged in the indictment may be punished by death, or where a de-

fendant under eighteen (18) years of age at the time of the commission of the crime is indicted for such a crime which if committed by an adult might be punishable by death . . . the Court . . . may allow such counsel his personal and incidental expenses upon a verified statement thereof being filed with the Clerk of such Court, and also reasonable compensation for his services . . .

• • •

In any case in which experts may be employed as witnesses and, in case it shall appear to the satisfaction of the Court or Judge thereof that the defendant is not financially able to employ experts, . . . the Court may . . . permit the employment of an expert, or experts, not exceeding two in number at an expense in the aggregate of not exceeding the sum of One Thousand Dollars ($1,000.00). Allowances under this section shall be a charge upon the County in which the indictment in the action is found . . .

N. Y. County Law, Section 718

. . . Nothing contained herein shall preclude a court on its own motion, or upon application of the Public Defender or by the indigent defendant, from appointing an attorney other than the Public Defender to represent such defendant . . . If such attorney is appointed, *he shall serve without compensation unless such compensation is otherwise provided for by law.*" (Emphasis added)

Questions Presented

In the Court below, appellants asked the Court of Appeals of the State of New York to declare the limiting portions of these statutory provisions in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The arguments objected to the statutes in the following particulars:

1) In discriminating between capital and non-capital cases for the providing of funds to assigned counsel, both for experts and for legal services, the State laws denied DOWDLE, indicted for a non-capital felony, (a) equal protection of the law, and (b) due process of law. Equal protection is violated because in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) this Court overruled the special circumstances rule of *Betts* v. *Brady*, 316 U. S. 455 (1942), and declared that *ALL* indigent defendants had a constitutional right to the assistance of counsel. Due process is violated because the State's highest Court has interpreted Section 308 of the Code of Criminal Procedure to permit the hiring of psychiatric experts *ONLY* in capital cases, regardless of the demonstrated need, *Marcus* v. *Joseph*, 305 N. Y. 813 (1953) and likewise permits payment of compensation for services of counsel *only* in capital cases; thus, in effect, denying to non-capital indigent defendants counsel who can assist in their defense in a meaningful way.

2) In providing prosecutors with unlimited funds in all cases, *N. Y. County Law*, Section 825, capital, non-capital, misdemeanor, and felony; and in specifically prohibiting, in all but capital cases, the payment of any compensation to assigned counsel for anything, *N. Y. County Law*, Section 718, the State denied DOWDLE the equal protection of the law.

3) In providing for authorization and permission of the trial Court in advance of, and as a precondition to, the employment of any experts, *N. Y. Code of Criminal Procedure,* Section 308, Memorandum opinion of the Court of Appeals in this case, pp. 14, *infra,* the State denies to the indigent defendant, and denied to the Appellant, DOWDLE, in this case, the benefit of the good faith judgment of assigned counsel; and because of this substitution of judgment and preliminary gauntlet of merit, the State violates due process as this Court has interpreted that phrase. *Douglas* v. *California,* 372 U. S. 353 (1964).

Statement of the Case

On the day after Christmas, 1965, Joan Henderson waited at a bus stop, in her usual manner, to go to work. Several other persons stood by. Appellant DOWDLE, who was at that time a patient at the Rochester State Hospital and who had been civilly certified for psychiatric treatment there, approached her from behind and grabbed her about the waist (R. p. 3, 22). Passers-by frightened DOWDLE away and no harm came to Miss Henderson.

On these facts the Grand Jury of Monroe County indicted DOWDLE for attempted first degree rape, (R. p. 3).

DOWDLE was at all times an indigent (R. p. 13). The County Court assigned counsel to defend him in the person of Matthew T. Hogan, Esq. (R. p. 15).

The State examined DOWDLE psychiatrically and found him competent to stand trial (R. p. 15, 16). To rebut this finding and to acquire a *complete* psychiatric picture, Counsel who was originally assigned searched for funds from DOWDLE'S mother, but in vain (R. p. 16). He then asked Dr. William Libertson, a psychiatrist, to examine DOWDLE and to give a psychiatric report on him. At this

point, New York law provided for experts *only* in capital cases, N. Y. CODE OF CRIMINAL PROCEDURE, Section 308, *Marcus* v. *Joseph*, 305 N. Y. 813 (1953). Even then, permission to employ, and the actual employment of the expert, rested in the sole discretion of the *Court, NOT* counsel.

Dr. Libertson's report related the whole psychiatric history extending over a seven year period. While the report did not allow for the defense of legal insanity-delusions, hallucinations and psychotic separation from reality—(but see how quickly this rule of law is changing in New York, *U. S.* v. *Freeman*, 357 F. 2d 606 (1966).); its contents clearly drew in question the element of *mens rea*, or the criminal state of mind. This defense would have been grounds for a *not guilty* finding to any charge, even a misdemeanor. N. Y. PENAL LAW, Section 244, 245.

Assigned counsel, inexperienced in criminal psychiatry, and involved in the press of business, overlooked this point. He pleaded DOWDLE guilty to the felony charge (R. p. 17).

Later on, when the law firm as a whole reviewed the case, the psychiatric defense became apparent, and assigned counsel and others moved to vacate the plea of guilty and enter a defense. The district attorney resisted vigorously but the Court granted the motion *AFTER* reading Dr. Libertson's report. The prosecution failed to contradict that report in answering the moving papers.

Although Dr. Libertson acknowledged a willingness to testify at the trial, there were no funds to pay his fee for such testimony. He had not yet been paid for the report, although his bill for services arrived on May 11, 1964. (No one has yet paid him.) He would not testify without payment in advance.

There was no legal authority under which a New York Court would entertain a prior application to pay Dr. Libertson for his testimony. There was no way to make the application prior to trial and appeal it. N. Y. CODE OF CRIMINAL PROCEDURE, Sections 515, 517, limits appeals in Criminal cases to review of *FINAL* judgments. Appellate courts in New York may not review interlocutory orders of the trial judge. Thus, at the point when the Court granted the motion to withdraw the plea of guilty, DOWDLE, who was in jail *at all times* during the proceedings, had the following options:

1) Stay in jail for a sham trial without a psychiatric expert, undergo a *FINAL* judgment of conviction for attempted first degree rape, and appeal the refusal to grant a psychiatrist through the State Court system. Estimated time to reach the Court of Appeals: Eighteen (18) to Twenty-four (24) months. Outlook: Fair to good, for a *New Trial.* Total time in jail prior to *second* trial: Thirty (30) to Thirty-six (36) months. Risk: High because of a *FELONY* conviction.

2) Move for a psychiatric expert in advance of trial upon papers and statutes. File order of County Court denying request for a psychiatrist. Appeal this order directly to the Supreme Court of the United States. Estimated time to reach the Supreme Court: Six to Eight (8) months. Outlook: Extremely poor. Total time required to eliminate option: One (1) year, with Option 1 to follow.[1]

3) Accept the offer of the District Attorney to plead guilty to third degree assault. Appeal that conviction on the ground that denial of funds for experts, and for legal services, in effect, coerced the plea to this misdemeanor. Move for payment

[1]Naturally this is a lawyer's guess. However, the problems of federalism involved in taking a novel question to the Supreme Court of the United States without first affording a state appellate court the opportunity to review it are formidable and discourage optimism in outcome.

to Libertson and appeal the order denying payment. Estimated time: Four (4) months in jail, Two (2) to three (3) years in Courts. Risk: Very low, misdemeanor plea limits sentence to one (1) year. Outlook: Fair to good, for ultimate reversal and new trial without the prospect of being in jail all the while.

DOWDLE himself reluctantly chose the third option. He pleaded guilty to third degree assault and the Court sentenced him to the maximum of one (1) year. (R. pp. 4-5).

Counsel obeyed DOWDLE'S instructions in the matter because indigents must stay in jail despite any defense they have, and despite their innocence. Indigents cannot raise bail. Their legal remedies and the effect of their pleas must be regarded in the light of their condition. Our legal system does not accord these accuseds the liberties which the presumption of innocence requires. No attorney can refuse to follow their decisions, therefore, and keep them confined for long periods in jail in order to proceed from a better strategic position legally. Whether they wish to suffer confinement for several years to prove a legal point is up to them — not up to counsel. Dowdle chose the plea of guilty to a lesser offense and what man can fault him for it?

In any event, shortly after sentencing, appellants Dowdle and Hogan, moved to set aside the conviction on due process grounds, and moved for orders directing payment to Dr. Libertson and to assigned counsel (R. pp. 11, 12). In addition, appellants moved to take the testimony of the Director of the Indigent's Defense program of Monroe County (R. p. 11). This last motion hoped to put on record the workings of a system in Rochester, New York, that gave assigned counsel no financial help whatsoever for legal services rendered, and no money to hire experts. The County Court denied all motions without comment. The Appellate Divi-

sion did likewise, unanimously (R. pp. 32-34). Upon application for leave to appeal to the Court of Appeals of the State of New York, counsel for appellants limited the question for review solely to the issue "whether the Fourteenth Amendment to the Constitution of the United States requires the State of New York in circumstances such as this case presents to provide expert witness fees and reasonable attorney's fees" (R. pp. 39-40).

The Court of Appeals granted leave in April 1965. In October, the Court heard argument. In November, the Court entered its memorandum opinion and unanimous affirmance.

The decision of the Court of Appeals came *after* the New York State Legislature had enacted Chapter 878 of the *Laws of New York,* 1965. This act nullified, prospectively, the effect of Section 308 of the Code of Criminal Procedure, and repealed its provisions distinguishing between capital and non-capital cases. It awarded counsel fees and fees for experts. See *County Law of New York,* Art. 18—B, Section 722 b and c. It became effective December 1st, 1965.

This new law, therefore, did not aid Dowdle. But it did render moot in a very practical way, the policy arguments which appellant had brought to the Court of Appeals for review. The new statute had no legal effect on these questions, however, and the Court of Appeals ruled on the Constitutional issues.

In respect to the opinion of the Court of Appeals, which mandated an effort to secure court authorization in advance of retaining the physician, (a procedure which is tantamount to a preliminary gauntlet of merit, and which, for that reason, violates the principles of due process this court enunciated in *Douglas* v. *California,* 372 U. S. 353 (1964))

appellant urges the point that prior court authorization, in the summer of 1964, had no possible chance of success. It was a meaningless gesture. There is no warrant in law for a futile act. Many New York cases held directly against it.[2] The only case on point is *this* case, decided more than a year *AFTER* the original application. The fact is that appellants *did apply* for confirmation of their good faith acts as officers of the Court prior to appeal. If prior application to the trial judge had a chance of success, why did the motion to confirm fail? The trial was the same. The motion happened within a few short weeks of the retainer of the psychiatrist. What does the Court of Appeals suggest would be different if the attorney asked for payment *before* rather than *after* employment?

This ruling is not, appellants submit, an independent procedure which state law *required at the time,* and with which the failure to comply would constitute adequate state grounds for precluding consideration of the constitutional issues. This is merely a device to dodge and avoid confrontation with a serious due process issue, and for very understandable reasons.

The Questions Presented are Substantial

Despite the opinion of the Court of Appeals to the contrary, appellants contend that: 1) the judgment of conviction is void because the plea of guilty was, in fact, coerced under the assigned counsel — no bail — no money system practiced in Rochester, New York, and 2) the defendant, Dowdle, did not get the benefit of Dr. Libertson's services, because Dowdle could not afford to pay the psychiatrist's

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[2]Indeed, until the prosecution used experts, the state would grant none to the defendant. *People* v. *Konono,* 31 Misc. 2d 90 (1961). Compare also *People* v. *Harvey,* 24 Misc. 2d 1022 (1960), *People* v. *Leach,* 42 Misc. 2d 143 (1964); *Matter of Grossman,* 261 App. Div. 1112 (1941).

fee for testimony at the trial. See *U. S.* v. *Baldi,* 192 F. 2d 540 (3rd Cir. 1951). The lack of money was the most significant factor in the decision to plead guilty. That fact alone constitutes a denial of due process of law, vitiates the judgment of conviction, and demands a new trial.

> ". . . there can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." *Griffin* v. *Illinois,* 351 U. S. 12 at 19 (1956).

Advocates who have pleaded many appellate cases are divided in their recommendations as to what a jurisdictional statement, or a prayer for certiorari, to this Court should contain. Some say throw in the whole case, law, facts, and a Brandeis brief. Some say follow the Court rules and make it short and to the point. Probably each method has merit.

This case must reach your court, if at all, on the simple statement that Dowdle, and millions like him, did not get a fair trial. Since the decision in *Gideon* established the constitutional right to the assistance of counsel in all criminal cases, the states have wrestled between the sham of *pro-forma* appointments and the triumph of truly effective representation. The cost — the proverbial 'where's the money coming from?' — has emerged as a fundamental obstacle to universal recognition of this constitutional guarantee.

One State, at least, has taken the lead through the judicial branch of government. *State* v. *Rush,* 46 N. J. 399, 217 A. 2d 441 (1966). Skirting, hurdling, and pole-vaulting the constitutional questions like an olympic pentathelon runner, Chief Justice Weintraub of the New Jersey Supreme Court has ordered compensation paid to assigned counsel as of January 1, 1967. But in respect to the disbursements required to present a proper defense, that same Justice did not hesitate:

"The obligation of the State to provide the indigent with the means for an appropriate defense rises from an interplay of the constitutional rights to counsel, to a fair trial, and to equality before the law." 217 A. 2d at 450.

The instant case presents the constitutional questions whether a State must provide some funds to counsel (a) for expert witnesses and the like in order to press a legitimate defense and (b) for services which counsel renders in the defense and appeal of the case.

Naturally the Sixth and Fourteenth Amendments are silent on the specifics of what comprises "due process" or the "assistance of counsel". There is, too, much force in the argument that *no* court should write into a Constitution its own specific preferences as to how a State should comply with due process in criminal prosecutions.

But if no specifics are forthcoming from this Court, the promise of *Gideon* shall wither and weaken until it becomes a fatuous platitude. *Gideon* made no difference to Dowdle. The County Court of Monroe County has always appointed counsel in felony cases. It did so, of course, long *after* police interrogation, confinement without bail, holding incommunicado, confession, waiver of preliminary hearing and grand jury presentment, — as standard procedure. That's what happened in this case. Here, however, the psychiatric history of the defendant gave defense counsel the opportunity to resist the charge with an intelligent, and possibly effective, plea. *Gideon's* silence on the question of what specifically constitutes the assistance of counsel left the door open for all the Courts of the State of New York to affirm a conviction wrongfully wrought from an indigent's coerced plea of guilty.

These questions will not go away. They have lain unanswered beneath the surface since *Powell* v. *Alabama*, 287 U. S. 45 (1932). They shall burst upon the floor of State Appellate Courts en masse now that New Jersey has acted.

Dowdle's plea should speak for all of them.

CONCLUSION

Appellants respectfully ask that the Court note probable jurisdiction in this cause and place the case upon its calendar for argument on appeal.

Dated: June 1, 1966

Respectfully submitted,

JOHN MANNING REGAN, ESQ.

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APPENDIX

Decision

COURT OF APPEALS — NOVEMBER 24, 1965

4. No. 297. 65

The People &c.,

Respondent,

vs.

Richard Allen Dowdle,

Appellant.

—

In the Matter of the Application of Matthew T. Hogan & ano.,

Appellants,

vs.

Gordon Howe, Director of Finance of the County of Monroe, New York, & ors., &c.,

Respondents.

—

Judgment and order affirmed. Appellant does not demonstrate any legal infirmity in the judgment of conviction for assault, third degree, entered on his plea of guilty. On the appeal from the affirmance of the order denying the application of attorneys for payment of the fee of a psychiatrist retained by the attorneys no constitutional rights of defendant are shown to have been violated since he had the benefit of the physician's services. No rights of the petitioner-attorneys or of the physician were violated by the refusal to pay the fee since no effort was made to secure court authorization in advance of retaining the physician.

No opinion.

All concur.

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MATTHEW T. HOGAN, Esq.,

Petitioner-Appellant,

v.

GORDON HOWE, Director of Finance of the County of Monroe, New York, The Honorable Arthur Levitt, Comptroller of the State of New York, and John C. Little, Jr., District Attorney of Monroe County, New York,

Appellees.

IN THE ABOVE APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

NOTICE OF MOTION TO DISMISS APPEAL AND BRIEF FOR APPELLEE, GORDON A. HOWE, DIRECTOR OF FINANCE OF THE COUNTY OF MONROE, NEW YORK

WILLIAM J. STEVENS, Esq.
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Appendix

STATUTE CITATIONS

Section 8 of the Code of Criminal Procedure of the State of New York A1

Section 188 of the Code of Criminal Procedure of the State of New York A1

Section 308 of the Code of Criminal Procedure of the State of New York A1

Section 718 of the County Law of the State of New York A3

Section 722 of the County Law of the State of New York A3

Section 722-a of the County Law of the State of New York A4

Section 722-b of the County Law of the State of New York A4

Section 722-c of the County Law of the State of New York A6

Section 722-d of the County Law of the State of New York A6

Section 722-e of the County Law of the State of New York A7

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PEOPLE OF THE STATE OF NEW YORK,

Appellee.

In the Matter of the Application of

MATTHEW T. HOGAN, Esq.,

Petitioner-Appellant,

v.

GORDON HOWE, Director of Finance of the County of Monroe, New York, The Honorable Arthur Levitt, Comptroller of the State of New York, and John C. Little, Jr., District Attorney of Monroe County, New York,

Appellees.

NOTICE OF MOTION TO DISMISS APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK BY APPELLEE GORDON A. HOWE, DIRECTOR OF FINANCE OF THE COUNTY OF MONROE, NEW YORK

1. NOTICE is hereby given that APPELLEE GORDON A. HOWE, Director of Finance of the County of Mon-

roe, State of New York, moves to dismiss the appeal herein on the ground that the facts of this case do not bring the appeal within the provisions of Title 28 of the United States Code Section 1257 (2), upon which appellant relies, because no substantial Federal question is presented.

II. That accompanying this Notice of Motion is a Brief for APPELLEE, GORDON A. HOWE.

WHEREFORE, APPELLEE, GORDON A. HOWE respectfully moves this Court for an Order dismissing the appeal herein in all respects.

Respectfully submitted,

Signed: _____

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Appellees.

BRIEF FOR APPELLEE GORDON A. HOWE, DIRECTOR OF FINANCE OF THE COUNTY OF MONROE, NEW YORK

STATEMENT OF APPELLEE GORDON A. HOWE, DIRECTOR OF FINANCE OF THE COUNTY OF MONROE, NEW YORK

This appeal is taken from a final judgment of the Court of Appeals of the State of New York unanimously affirming a judgment of the Appellate Division of the Supreme Court of the State of New York which unanimously affirmed, without opinion, a judgment and related Orders of the Monroe County Court of the State of New York, the Court of original jurisdiction in this matter.

Appellant Dowdle, after a preliminary hearing, was examined at the Rochester State Hospital as to his legal sanity and after indictment by the Monroe County Grand Jury for the crime of Assault Second Degree, with intent to commit rape, a felony under the laws of the State of New York, pleaded guilty (while represented by counsel) to the crime as charged in the indictment. After that time, upon application of counsel and argument to the Monroe County Court, Appellant Dowdle was allowed to withdraw his plea of guilty to the felony charge and to plead guilty to the lesser charge of Assault Third Degree and was sentenced to be imprisoned for one year.

Thereafter, motions were made to the Monroe County Court by John Manning Regan, Esq., and his associate Matthew T. Hogan, Esq., the Court assigned Counsel for Appellant Dowdle, for payment of legal fees by the County of Monroe to Messrs. Regan and Hogan and to a psychiatrist, Dr. William Libertson, whose services Messrs. Regan and Hogan had engaged and who had made an examination of Appellant Dowdle and written a letter to counsel which was available to the Court upon Appellant Dowdle's plea to the reduced charge. The Orders of the Monroe County Court denying these motions were appealed and heard with the appeals of the judgment of conviction of Appellant Dowdle and likewise affirmed.

Appellant's statement as to jurisdiction was served on the Attorney for Gordon A. Howe, Appellee, on June 2, 1966.

Copies of this Notice of Motion and Brief were served by mail on June 30, 1966 on John Manning Regan, Esq., and Matthew T. Hogan, Esq., and Appellees Arthur Levitt, Comptroller of the State of New York, and John C. Little Jr., District Attorney of the County of Monroe, New York.

QUESTION PRESENTED

Whether the judgment of the Court of Appeals of the State of New York, in finally affirming the judgment of conviction of Appellant Dowdle and the Orders of the Monroe County Court denying payment of fees to two attorneys, one of whom was assigned as counsel to an indigent accused of a felony assault, and also denying payment of the fee of an expert witness, violated the Constitution of the United States.

STATEMENT OF THE CASE

Appellee states that the judgment of the Court of Appeals was in accord with the laws and the Constitution of the State of New York and the Constitution of the United States.

County Law Section 718 of the Statutes of the State of New York, appended in full, at the time of the commission of the crime and of the judgment of conviction in the Monroe County Court provided that counsel assigned by the Court should serve without compensation in matters other than capital cases.

The Code of Criminal Procedure of the State of New York, Section 308, in force at the above time, clearly intended prior application and authorization by the Court for the

compensable employment of an expert witness in the case of an indigent defendant, especially where the crime charged was not punishable by death or life imprisonment.

In this matter, the expert, a psychiatrist, did not testify at a trial or hearing but wrote a letter containing his opinion to counsel.

In broad aspect, provision had been made in a number of the statutes of the State of New York, so that an indigent accused should not lack for counsel or for fair hearing of his cause at any stage of criminal proceedings brought against him because of indigency alone. Section 308 of the Code of Criminal Procedure *required* that counsel be assigned upon request of the indigent accused.

Nothing contained in County Law Section 722, 722-a, 722-b, 722-c, 722-d and 722-e dealing with these same matters which became law on December 1, 1965 indicated that a retroactive effect was intended by the Legislature of the State of New York as to cases clearly arising and decided before the effective dates of these new statutes.

JURISDICTION

An indigent accused who is permitted to withdraw a plea of guilty to a felony and who is allowed to plead over to a reduced charge of Assault Third Degree, a misdemeanor, after counsel's application and argument to the Court and after the report of an expert has been made available for such purpose, cannot be heard to say that the efforts of counsel *or* expert in his behalf were ineffective.

Approval by the Court for the hiring at public expense of an expert witness is a reasonable procedural safeguard against abuse which does not offend against equal protection of the laws nor the concept of due process. It is preserved in different form in new Section 722-c of the County Law of the State of New York.

The memorandum decision of the Court of Appeals of the State of New York is quoted here in its entirety for its relevancy as to the Federal and State Constitutional questions which were raised before it by the Appellant in his Brief and Argument there.

Decision

"Judgment and order affirmed. Appellant does not demonstrate any legal infirmity in the judgment of conviction for assault, third degree, entered on his plea of guilty. On the appeal from the affirmance of the order denying the application of attorneys for payment of the fee of a psychiatrist retained by the attorneys no constitutional rights of defendant are shown to have been violated since he had the benefit of the physician's services. No rights of the petitioner-attorneys or of the physician were violated by the refusal to pay the fee since no effort was made to secure court authorization in advance of retaining the physician.

No opinion.

All concur."

This decision by the Court of Appeals, in a case brought before it by leave of a Judge of that Court, and practical in approach, capitalizes the effort of the People of the State of New York to insure an indigent of a fair hearing. Appellant Dowdle was first examined psychiatrically at public expense at the direction of the Court and counsel was assigned at his request who represented him according to the canons of Ethics of the Bar Association of the State of New York and his cause was heard three times: once before the Monroe County Court, and twice upon full appeal. He was represented by counsel throughout and benefited from the services of an expert. Any contention that a substantial

question exists as to the denial to Appellant Dowdle of the equal protection of the laws and the due process of law guaranteed by the Constitution of the United States, is controverted by the actual facts in this case.

The rights of this Appellant to counsel, when charged with a crime, were guaranteed by the Constitution of the State of New York Article 1 Section 6, and Sections 8, 188, and 308 of the Code of Criminal Procedure and Section 718 of the County Law of the Laws of the State of New York made thereunder, as well as the Constitution of the United States.

The new sections of the County Law of the State of New York hereinbefore set forth, now contain the more specific mandate of the Legislature as to the manner in which the rights of an indigent accused under the Constitution of the State of New York and the Constitution of the United States are to be secured.

CONCLUSION

Appellee Gordon A. Howe, Director of Finance of the County of Monroe, State of New York, respectfully prays that the Appeal herein be dismissed.

WILLIAM J. STEVENS, ESQ.,
MONROE COUNTY LEGAL ADVISER
Attorney for Gordon A. Howe, Appellee, Director of Finance
of the County of Monroe,
New York
(ROBERT D. CRAIG *of Counsel*)
307 County Office Building
Rochester, New York 14614

APPENDIX

Section 8 of the Code of Criminal Procedure of the State of New York

> "Rights of a defendant in a criminal action
>
> In a criminal action the defendant is entitled
>
> 1. To a speedy and public trial,
> 2. To be allowed counsel as in civil actions, or he may appear and defend in person and with counsel; and
>
> ....."

Section 188 of the Code of Criminal Procedure of the State of New York

> "Magistrate to inform defendant of the charge, and his right to counsel
>
> When the defendant is brought before a magistrate upon an arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had."

Section 308 of the Code of Criminal Procedure of the State of New York

> "Defendant appearing for arraignment without counsel to be informed of his right to counsel
>
> If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel. When services are rendered by counsel in pursuance of such assignment in a case where the offense charged in the indictment may be punished by death or where a defendant under eighteen years of age at the time of the commission of a crime is indicted for such a crime which if committed by an adult might be pun-

ishable by death or on an appeal from a judgment of death or on an appeal as of right from a judgment of life imprisonment imposed in accordance with section ten hundred forty-five, ten hundred forty-five-a, of the penal law, the court in which the defendant is tried, or the trial results in a disagreement of the jury, or the action or indictment is otherwise disposed of, or by which such appeal is determined, or the court in which an action is suspended or discontinued or otherwise disposed of on the ground that the defendant has been heretofore or is hereafter declared incompetent by a duly appointed commission, may allow such counsel his personal and incidental expenses upon a verified statement thereof being filed with a clerk of such court, and also reasonable compensation for his services in such court, not exceeding the sum of fifteen hundred dollars in cases where one counsel has been assigned and not exceeding the sum of two thousand dollars in cases where two or more counsel have been assigned. In such a case where it shall appear to the satisfaction of the court that a daily copy of the testimony is necessary to be furnished by the stenographer to the counsel for the defendant upon an order duly signed by the presiding justice that the stenographer furnish the same, the same shall be furnished to the counsel for the defendant, and the cost of said daily copy shall be a charge upon the county. In any case in which experts may be employed as witnesses and in case it shall appear to the satisfaction of the court or a judge thereof that the defendant is not financially able to employ experts, the court to which the indictment is presented or sent or removed for trial or a judge or justice thereof may direct the employment of expert witnesses for the defendant in number not exceeding the number sworn or to be sworn for the prosecution or, where the affirmative presentation of evidence on the issue is incumbent on the defendant, and the prosecution has not indicated any number of experts to be employed, the court or judge may upon satisfactory proof of the necessity therefor, permit the employment of an expert or experts not to exceed two in number, at an expense in the aggregate of not exceed-

ing the sum of ten hundred dollars. Allowances under this section shall be a charge upon the county in which the indictment in the action is found, to be paid out of the court fund, upon the certificate of the judge or justice presiding at the trial or otherwise disposing of the indictment, or upon the certificate of the appellate court, but no such allowance shall be made unless an affidavit is filed with the clerk of the court by or on behalf of the defendant, showing that he is wholly destitute of means. As amended L. 1963, c. 994, § 4."

Section 718 of the County Law of the State of New York

"Nothing contained herein shall preclude a court on its own motion or upon application by the public defender or by the indigent defendant, from appointing an attorney other than the public defender to represent such defendant or to assist in the representation of such defendant at any stage of the proceedings or on appeal. If such attorney is appointed, he shall serve without compensation, unless such compensation is otherwise provided for by law. Added L. 1961, c. 365, § 2, eff. July 1, 1961."

Section 722 of the County Law of the State of New York

"The board of supervisors of each county and the governing body of the city in which a county is wholly contained shall place in operation throughout the county by December first, nineteen hundred sixty-five a plan for providing counsel to persons charged with a crime, who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense. The plan shall conform to one of the following:

1. Representation by a public defender appointed pursuant to county law article eighteen-A.

2. Representation by counsel furnished by a private legal aid bureau or society designed by the county or city, organized and operating to give legal assistance and representation to persons charged with a

crime within the city or county who are financially unable to obtain counsel.

3. Representation by counsel furnished pursuant to a plan of a bar association in each county whereby the services of a private counsel are rotated and coordinated by an administrator. Any plan of a bar association must receive the approval of the judicial conference before the plan is placed in operation.

4. Representation according to a plan containing a combination of any of the foregoing.

Any judge, justice or magistrate in assigning counsel pursuant to sections one hundred eighty-eight, three hundred eight and six hundred ninety-nine of the code of criminal procedure shall assign counsel furnished in accordance with a plan conforming to the requirements of this section. Added L. 1965, c. 878, § 1, Dec. 1, 1965."

Section 722-a of the County Law of the State of New York

"For the purpose of this article, the term "crime" shall mean a felony, misdemeanor, or the breach of any law of this state or any any law, local law or ordinance of a political subdivision of this state, other than one that defines a "traffic infraction," for which a sentence to a term of imprisonment is authorized upon conviction thereof. Added L. 1965, c. 878, § 1, eff. Dec. 1, 1965.

Section 722-b of the County Law of the State of New York

"All counsel assigned in accordance with a plan of a bar association conforming to the requirements of section seven hundred twenty-two whereby the services of private counsel are rotated and coordinated by an administrator shall at the conclusion of the representation receive compensation at a rate not exceeding fifteen dollars per hour for time expended in court or before a magistrate, judge or justice, and

ten dollars per hour for time reasonably expended out of court, and shall receive reimbursement for expenses reasonably incurred. Where a defendant is charged with a crime punishable by death or where a defendant under eighteen years of age at the time of the commission of a crime is indicted for a crime which, if committed by an adult, may be punishable by death, compensation shall not exceed one thousand five hundred dollars where one counsel has been assigned, and shall not exceed two thousand dollars where two or more counsel have been assigned. Where a defendant is charged with one or more other felonies, compensation shall not exceed five hundred dollars. Where a defendant is charged with one or more misdemeanors, compensation shall not exceed three hundred dollars. For representation in an appellate court on an appeal from a judgment of death or on an appeal as of right from a judgment of life imprisonment, imposed in accordance with section ten hundred forty-five or section ten hundred forty-five-a of the penal law, compensation shall not exceed one thousand five hundred dollars where one counsel has been assigned, and shall not exceed two thousand dollars where two or more counsel have been assigned. For representation in an appellate court on an appeal from a judgment of conviction for one or more other felonies, compensation shall not exceed five hundred dollars. For representation in an appellate court on an appeal from a judgment of conviction for one or more misdemeanors, compensation shall not exceed three hundred dollars.

For representation on an appeal, compensation and reimbursement shall be fixed by the appellate court. For all other representation, compensation and reimbursement shall be fixed by the court where judgment of conviction or acquittal or order of dismissal was entered. In extraordinary circumstances the court may provide for compensation in excess of the foregoing limits.

Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, servies rendered, expenses in-

curred and reimbursement or compensation applied for or received in the same case from any other source.

No counsel assigned hereunder shall seek or accept any fee for representing the defendant for whom he is assigned without approval of the court as herein provided. Added L.1965, c.878, §1, eff. Dec. 1, 1965."

Section 722-c of the County Law of the State of New York

"Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel, whether or not assigned in accordance with a plan, to obtain the services on behalf of the defendant. The court upon a finding that timely procurement of necessary services could not await prior authorization may authorize the services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement. Only in extraordinary circumstances may the court provide for compensation in excess of three hundred dollars.

Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source. Added L.1965, c. 878, §1, eff. Dec. 1, 1965."

Section 722-d of the County Law of the State of New York

"Whenever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation or other services, counsel may report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to

the public defender, private legal aid bureau, or society, private attorney, or otherwise. Added L.1965, c. 878, §1, eff. Dec. 1, 1965."

Section 722-e of the County Law of the State of New York

All expenses for providing counsel and services other than counsel hereunder shall be a county charge or in the case of a county wholly located within a city a city charge to be paid out of an appropriation for such purposes. Added L. 1965, c.878, §1, eff. Dec. 1, 1965."

STATE OF NEW YORK)
COUNTY OF MONROE } SS.
CITY OF ROCHESTER)

Winifred A. Kelly , being duly sworn, deposes and says that she is employed in the Office of the Monroe County Legal Adviser, and that on the 30th day of June 1966, she deposited in a mail box maintained by the United States Government, in the lobby of the County Office Building, Rochester, New York, two copies of a Motion and Brief securely enclosed in a postpaid wrapper directed to LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Attorney for the HONORABLE ARTHUR LEVITT, Comptroller of the State of New York, the Capitol, Albany, New York, 12201, that being the address within the state designated by him for that purpose upon the papers in a prior action upon which this appeal is based, between which places there then was and now is a regular communication by mail. Deponent is over the age of 21 years.

Winifred A. Kelly

Sworn to before me this 30th
day of June 1966.

Robert D Craig

ROBERT D CRAIG

NOTARY PUBLIC, State of N.Y., Monroe County
My Commission Expires March 30, 19 67

STATE OF NEW YORK)
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ROBERT D. CRAIG
NOTARY PUBLIC, State of N.Y., Monroe County
My Commission Expires March 30, 1967

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In The

Supreme Court of the United States

October Term 1966
No. 204

RICHARD ALLEN DOWDLE,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

In the Matter of the Application of

MATTHEW T. HOGAN, ESQ.,

Appellant,

v.

GORDON HOWE, Treasurer of Monroe County, New York; JOHN C. LITTLE, District Attorney, and HON. ARTHUR LEVITT, Comptroller of the State of New York,

Appellees.

BRIEF OF APPELLANTS IN REPLY TO MOTION TO DISMISS

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BRIEF OF APPELLANTS IN REPLY TO MOTION TO DISMISS

Opinions Below

The Opinion of the Court below appears at 16 N. Y. 2d 1037, (1965).

Jurisdiction

The Jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. 1257(2). The Jurisdictional issue is treated fully in the Statement previously filed in accordance with Rule 15.

Constitutional Provisions

U. S. Constitution, Amendment XIV—Section 1 . . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The State statutes involved in this case are set forth verbatim in the Jurisdictional Statement of Appellant, and in the appendix to the brief of the appellee on its Motion to Dismiss.

Questions Presented

(1) Whether the Fourteenth Amendment to the Constitution of the United States, and, specifically, the due process and equal protection clauses thereof, requires a State: (a) to pay assigned counsel, in a felony case, some compensations in order to enable him to render necessary legal services *AND,* (b) to provide to assigned counsel some funds for reasonable expenses to cover the cost of expert witnesses' testimony which he wants to employ in the conduct of the defense of an indigent accused.

(2) Whether a conviction obtained — even on a plea of guilty — in the absence of funds to assigned counsel for

expert witnesses necessary in the defense of the accused indigent, and in the absence of funds for legal services rendered, is a denial of due process of law, and, considering that the State pays the prosecutor and *all* the prosecution witnesses, a denial of equal protection of the law.

(3) Whether a State may require an indigent defendant and his counsel to make a preliminary application to the trial judge and a showing of merit as a pre-condition to the employment of expert witnesses in a felony case. Whether, in fact, a State may subject an indigent to this procedural requirement for the first time on an appeal after his conviction.

Statement of the Case

On December 26th, 1963, Dowdle "grabbed" Joan Henderson, a 19 year old girl, at a bus stop in Rochester, New York. It was 8:00 o'clock in the morning. Passers-by frightened Dowdle away. The girl was not harmed. (R. p. 3, 22).

The Grand Jury of Monroe County indicted Dowdle for attempted first degree Rape (R. p. 3). County Court assigned Matthew T. Hogan to represent Dowdle, an indigent. (R. p. 13).

The State examined Dowdle psychiatrically to determine only *ONE* issue: Whether he was competent to stand trial. Section 662 of the New York Code of Criminal Procedure limits the report to that issue. N. Y. Code of Criminal Procedure, Section 658, Section 870 et seq. Appellant is filing as an exhibit in this Court, a duplicate original of that report, duly signed by Drs. Pollack and Feldman of the Rochester State Hospital. It is a public record. A copy is appended to this brief at the end.

Both that report, and the letter of Doctor William Libertson which appears in the record, disclose that Dowdle was a patient undergoing psychiatric treatment in the Rochester State Hospital at the time he "grabbed" Miss Henderson. In addition, together they disclose a similar psychiatric diagnosis of psychopathic personality, without mental disorder.

Procedurally, this case collapsed after that psychiatric examination. Doctor Libertson's report on May 11, and the State report on May 13, agreed that the defendant was not psychotic. Assigned counsel then pleaded defendant guilty to the felony charge. Thereafter, assigned counsel and others moved to withdraw the guilty plea. Doctor Libertson's report and the psychiatric history revealed a classic case of psychopathic loss of volitional control over conduct. They provided as well, grave doubts about the intentions of Dowdle as he "grabbed" Miss Henderson. What Dowdle thought, what he wanted, what his state of mind was, were all put in question by the psychiatric history. That was a legitimate defense. While the reports were enough to convince the trial court to withdraw the plea, they were not enough to bring the case to trial. That required money for expert testimony. To get this testimony, to retain experts who would contest Doctor Pollack's routine diagnosis, and who would elaborate upon and explain Doctor Libertson's opinions on the defendant's state of mind, counsel turned to the Monroe County Indigent's Defense Program, Thomas Hatrzell, Esq., Director. His answer: There was no money for such things. The Record (p. 11) shows that appellants tried to put Hartzell's testimony on the record in order to avoid technical objections to this factual data, but the Courts below denied examination of Hartzell or the District Attorney.

The District Attorney was sympathetic. He suggested a reduced charge, the misdemeanor of Third Degree Assault. With such an offer, and with no money to defend, pleading not guilty meant a much longer stay in the County Penitentiary than did a plea of guilty. Dowdle had no bail money. A misdemeanor meant a one year limit to his sentence. He had already been confined from February until July.

Although both defendant and assigned counsel wished to defend against *all criminal charges*, the no bail-no money-system, combined with defendant's incarceration until some final disposition was had (N. Y. CODE OF CRIMINAL PROCEDURE, Section 515, 517 bars appellate review of interlocutory issues)[1] coerced a guilty plea to the misdemeanor. Imagine it! The law's procedural requirements automatically sentenced Dowdle to jail for a longer time if he pleaded not guilty than if he pleaded guilty. Yet in the face of this form of coercion, our Court of Appeals has said:

> "Appellant does not demonstrate any legal infirmity in the judgment of conviction for assault, third degree, entered on his plea of guilty. 16 N.Y. 2d at 1038.

---

[1] There was no way to ask a State appellate court to provide funds in advance of trial. The law required some kind of final disposition of the case, then an appeal. This procedure lengthens the time of an indigent's incarceration who wants appellate review of such a preliminary question as here presented. The trial court was bound by the decision in *Marcus v. Joseph*, 305 N.Y. 813 (1953), and could do nothing.

ARGUMENT

POINT I

The insanity defense has merit, and New York has deprived Dowdle of an opportunity to present it at trial.

Justice Felix Frankfurter, dissenting in *United States v. Baldi*, 344 U. S. 561, 73 S. Ct. 391, 97 L. Ed. 549 (1953), stated:

> "A denial of adequate opportunity to sustain the plea of insanity is a denial of the safeguards of due process in its historical procedural sense which is within the incontrovertible scope of the Due Process Clause of the Fourteenth Amendment." 344 U.S. at p. 571.

The facts of the *Baldi* case also showed how State procedures, like lack of bail, lack of experienced trial counsel, and lack of funds, hamstrung a defendant. And as the late Thomas McBride, Esq. argued then, appellant argues here and now. State procedures have combined to deny appellant adequate opportunity to present the legitimate defense of insanity, and have denied him "the effective assistance of counsel".

First of all, appellant must show how New York recognizes insanity as a defense to crime.

Ever since *People v. Horton*, 308 N.Y. 1, (1955), New York's standards for legal insanity have been changing. The criteria are in flux. In *People v. Wood*, 12 N.Y. 2d 69 (1962), three judges of our court voted to dismiss an indictment because the right-wrong standard was so inadequately applied.

In 1965, New York's Legislature amended Section 1120 of the Penal Law to provide a standard for insanity that excused criminal responsibility if, at the time of the act, there was, as a result of mental disease or defect, substantial inability to appreciate the consequences of such conduct. This is a wholly new concept, as yet uninterpreted by our Court of Appeals.

In 1966, in *United States v. Freeman,* 357 F. 2d 606 (1966), the Second Circuit Court of Appeals reversed a conviction based on M'Naughten's rule, and directed a new trial on a new irresistible - impulse - product - of - mental - disease standard of insanity. That court is not without influence in the Courts of New York State.

What the next developments will be is anyone's guess. What is relevant here is that Dowdle can easily come within the scope of these changing standards. He need no longer trailblaze a defense. The preliminaries have already established his right to present his psychiatric evidence as a complete defense to the charge of criminal responsibility. Some of this development was obvious at the time of Dowdle's arraignment in July, 1964. Now, his legal rights are even more demonstrably evident.

If this Court grants a new trial, Dowdle will become the beneficiary of the newly enacted provisions of COUNTY LAW, Section 722, et seq. of New York. He will have his psychiatric experts at his new trial, not only in respect to this case, where he received but a one-year sentence; but also, in respect to an indictment for burglary, second degree, filed May 14th, 1965, wherein he received a sentence of fifteen (15) years, the maximum which the law allows. N. Y. PENAL LAW, Section 407 (2). The State got that burglary conviction under circumstances identical to this case wherein it provided no psychiatric assistance to as-

signed counsel, notwithstanding the fact that the police captured Dowdle fondling women's undergarments in a girls' dormitory.

This appeal therefore is not an academic exercise so far as Dowdle is concerned. He appeals to this Court for an order vacating his conviction because—as Justice Frankfurter said—"A denial of an adequate opportunity to sustain the plea of insanity is a denial of the safeguards of due process . . ."

All along the line of argument in this case, the respondents and the State Courts have concluded this issue by saying:

> ". . . no constitutional rights of the defendant are shown to have been violated since he had the benefit of the physician's services." 16 N.Y. at p. 1038.

Yet that is the point defendant has put in issue! Defendant claims his plea of guilty and his sentence were the product of his being unable to have psychiatric testimony available to him. True, Dowdle benefitted by a reduced charge as a result of Doctor Libertson's report. But what of it? He had a defense to the whole idea of criminal responsibility and the State deprived him of the means to assert it at trial. Not only that, State procedures compelled him to sit in jail during any time he tried to compel the state to provide him with free psychiatric testimony. The whole history of Section 308 of Code of Criminal Procedure, and how it puts a heavy burden of preliminary proof on an indigent defendant in order to justify public expense appears in *People v. Leach*, 42 Misc. 2d 143 (1964). But that is for a capital case! Dowdle, indicted for a non-capital felony, did not come within the provisions of Section 308 at the time of his arraignment. Under State law, he was entitled to nothing. There is no benefit to him if the

law gives him nothing! Of this situation, Judge Van Voorhis, dissenting in the *Marcus* case, said:

> "Section 658 et seq. of Code of Criminal Procedure . . . were not intended to supersede the right of an impecunious defendant in a criminal prosecution to present the defense of insanity to a jury or other trier of fact. *It would be unjust to have allowed this defense to be interposed, in other than capital cases, only by such defendants as could afford to employ a psychiatrist.*" *Marcus v. Joseph,* 281 App. Div. at p. 338 (1953).

To decide this case upon the assumption that Dowdle received the *full* benefit of his defense from the preliminary report of Doctor Libertson, when Dowdle has attacked the system whereby he receives no *testimonial benefit* from that psychiatrist is to assume the point in issue, usurp the trier of fact, and foreclose inquiry into a serious constitutional deprivation. Compare *Bush v. Texas,* 372 U. S. 586 (1963).

POINT II

State Law prohibiting payment of compensation to assigned counsel for indigents but providing for payment of compensation to prosecutors denies *Dowdle* the equal protection of the law.

The Courts who have treated the problem, (See Weintraub, J. in *State v. Rush,* 46 N. J. 399 (1966); and the writers who have delved into it, (Compare *Right to Aid in Addition to Counsel for Indigent Criminal Defendants,* 47 *Minn. L. Rev.* 1054 (1963) with *Equal Protection to the Indigent Defendant*: 16 *Stan. L. R.* 394, 413 (1964).); agree that the comparison of equivalency is between an indigent defendant and a defendant who can afford to pay.

This is not the argument Matthew T. Hogan, appellant herein, wishes to make in this court. The State of New York has no obligation to supply funds to a defendant of means. What *Gideon v. Wainwright,* 372 U. S. 335 (1963), did was to require a State to provide counsel for indigent defendants,—those without means. That decision must mean that no state can discharge that obligation in an unequal way. States must provide counsel equally.

Most states provide counsel to the executive branch of government in order to prosecute violators of State Law. England and Commonwealth countries do so by hiring private attorneys to prosecute on a case-by-case basis. American States have generally created the office of a public prosecutor, a district attorney. *Gideon* imposed the further duty on States to provide indigent defendants with the "effective assistance of counsel". This Court imposed that duty to enforce a constitutional mandate in the Sixth and Fourteenth Amendments.

Appellant Hogan argues that New York creates inequalities between prosecutors and defenders by supplying the

former with the public purse and by denying the latter any funds at all. This inequality is the product of State statutes. The law has created it.

Section 825 of the County Law of New York provides:

> '. . . The Count Judge, or the Special County Judge, of the County of Monroe, or any Supreme Court Justice, shall have power, on the application of the District Attorney of Monroe County, to order and direct the County Treasurer of Monroe County, to pay to the District Attorney *any sum of money* expended or incurred by him in the performance of the duties of his office . . .'' (Emphasis added)

At the very same time, the State's very same County Law provided, in respect to counsel defending Dowdle:

> Section 718—Appointment of Other Counsel
>
> Nothing contained herein shall preclude a Court on its own motion, or upon application of the Public Defender, or by the indigent defendant, from appointing an attorney other than the public defender. . . . If such attorney is appointed, he shall serve without compensation, unless such compensation is otherwise provided by law.

Since Monroe County *never had, does not have now,* and *probably never will have, a public defender's office* for defense of felony cases, only the last sentence applies to criminal cases like Dowdle's.

For the State, as a matter of law, to grant prosecutors limitless funds as compensation for duties of their office, and to deny any funds at all as compensation to assigned counsel for the performance of their duties, is a clear-cut deprivation of equality before the law to indigent defendants. And it is likewise a clear-cut violation of the constitutional command of the Fourteenth Amendment:

> ''No State shall deny to any person within its jurisdiction, the equal protection of the law.''

POINT III

Preliminary showings of merit to qualify for State Aid in defense of indigents is unconstiutional.

The Court of Appeals very clearly limited its decision to the rights of the psychiatrist and the attorney when it required prior approval of hiring an expert witness. It did not say Dowdle had to make prior application. But, of course, this is a metaphysical fiction. What procedures a Court requires of the defense affect Dowdle, the defendant.

Section 308 of the Code of Criminal Procedure did not apply to felony defendants in non-capital cases when the State tried Dowdle. There was *no* procedure for him to pursue to get money for psychiatric testimony.

People v. Leach, 42 Misc. 2d 143 (1964) does give a good presentation of what a New York trial court would require as a preliminary showing to qualify for State assistance. The burden is heavy. The decision is wholly up to the Court.

These procedures violate the holdings of this Court in *Douglas v. California*, 372 U. S. 353, and *Draper v. Washington*, 372 U. S. 487 (1963) because they:

1) Substitute the judgment of the Court for counsel's judgment.
2) Impose stricter procedural burdens on an indigent than on prosecutors or on defendants who can pay.

CONCLUSION

Appellants respectfully ask this Court to deny the Motion to Dismiss and note probable jurisdiction.

Respectfully submitted,

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Attorneys for Appellants
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45 Exchange Street
Rochester, New York 14614

APPENDIX

Report of Qualified Psychiatrists

THE PEOPLE OF THE STATE OF NEW YORK

against

RICHARD ALLAN DOWDLE

Defendant

STATE OF NEW YORK }
COUNTY OF MONROE } ss:

We, the undersigned, duly certified as qualified psychiatrists by the Board of Psychiatric Examiners of the Department of Mental Hygiene of the State of New York, having been appointed by L. L. BRYAN, M.D., Acting, Director of the ROCHESTER State Hospital, at ....., New York, pursuant to an order signed by Hon. HARRY L. ROSENTHAL at a term of the COUNTY Court, held in and for the County of MONROE, at the County Court House in the City of ROCHESTER, on the 13th day of MAY, 1964, in accordance with the Code of Criminal Procedure to examine RICHARD ALLAN DOWDLE, the above defendant, to determine the question of his sanity and to report to the court, state that we have forthwith conducted such examination with due care and diligence, pursuant to the Code of Criminal Procedure and we have come to the following opinion as a result of such examination:

It is our opinion that the defendant RICHARD ALLAN DOWDLE is not in such state of idiocy, imbecility, or in-

sanity as to be incapable of understanding the charge against him or the proceedings or of making his defense.

/s/ BENJAMIN POLLACK M. D.
BENJAMIN POLLACK

/s/ HAROLD FELDMAN M. D.
HAROLD FELDMAN

STATE OF NEW YORK }
COUNTY OF MONROE } ss:

BENJAMIN POLLACK, M.D., HAROLD FELDMAN, M.D. being severally sworn, each for himself, deposes and says that each has read the foregoing report, by him subscribed and knows the contents thereof and that the same is true of his own knowledge, except as to the matters stated to be upon information and belief, and as to those matters, he believes them to be true.

/s/ BENJAMIN POLLACK M. D.
BENJAMIN POLLACK

/s/ HAROLD FELDMAN M. D.
HAROLD FELDMAN

Subscribed and sworn to
before me this 15th day
of May, 1964.

/s/ GRACE M. GUEST
Notary Public, Monroe County
New York
My commission expires, March 30, 1965

The duly appointed psychiatric examiners to examine and report in the case of Richard Allan Dowdle do state that on May 15, 1964 we examined the said defendant in one of the medical offices at the Rochester State Hospital. Both of the examiners had previously examined this man while he was a patient at the Rochester State Hospital from November 7, 1962 until January 13, 1964, where we are fully aware of his previous history and the fact that he had previously been a patient at the Willard State Hospital in 1961, and at the Rochester State Hospital from June 30, 1961 until August 8, 1961. During all his admissions he had been diagnosed as Without Mental Disorder, Psychopatic Personality, Pathological Sexuality.

The duly appointed examiners had conducted an extensive examination of this man on January 13, 1964. We are aware of the fact that his laboratory and physical examinations are negative. He appears to be of better than average intelligence. When examined on this date, he talked freely, readily, and frankly. He appeared somewhat tense and anxious, but he readily admitted his past difficulties and gave a good story and description of them. He realizes that his conduct has been abnormal for the past seven years or more, and he earnestly desires help and has sought it from time to time. He claims that he has tried to control his urges and has attempted to conform to conventional behavior but has been unable to do so. There is no evidence of hostility, rationalization, projection, or hostility to people. He remarks that there must be something wrong with him since he realizes that what he has done over the years has been abnormal. He claims he has no desire to hurt people. He has sought treatment and help from others without any particular alleviation in his tendencies or impulses.

Recommendations

1. This man has shown an abnormal personality reaction over many years, going back at least seven or eight years and possibly much longer.

2. There is much desire for conformity and a feeling for the need for help.

3. He is distressed, perplexed, and uneasy at his consistent inability to conform to the normal demands and conventions of society.

4. To date, hospitalization or treatment elsewhere has been of little or no help in the alleviation of his problems.

5. He has shown no dangerous tendency to date, but his habits have been annoying and frightening to others.

6. He requires confinement and psychiatric treatment if there is to be any hope of rehabilitating this defendant.